UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 93-27-P-C***
	)	***(Civil No. 97-56-P-C)***
LUIS A. SANTIAGO,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Luis A. Santiago moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Santiago was convicted after a jury trial of conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. §§ 841 and 846. He was sentenced to a term of 280 months imprisonment. His contends that he received ineffective assistance of counsel because the attorney who represented him proceeded to trial after Santiago had accepted a plea bargain offered by the prosecution.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that Santiago's allegations cannot be accepted as true, and accordingly I recommend that his motion be denied without an evidentiary hearing.

1. Background

As the First Circuit noted on direct appeal of this matter, Wilfredo Figueroa, a Lawrence, Massachusetts drug dealer, testified that he obtained heroin for resale from Santiago. *United States v. Santiago*, 83 F.3d 20, 22 (1st Cir. 1996). Specifically, Figueroa testified that Santiago had actual knowledge that the heroin he provided was sold to users in Maine, that Santiago provided fifty bags of heroin on a daily basis, and that Santiago extended credit to Figueroa. *Id*. at 24; Trial Transcript ("Trial Tr.") (Docket No. 37) at 35-36, 74. Two of Figueroa's customers testified that on at least one occasion Santiago met some of Figueroa's clients while making a delivery of heroin to Figueroa's home. 83 F.3d at 24.

Santiago was found guilty of the conspiracy charge after a trial at which Figueroa and two of his Maine clients testified. Trial Tr. at 17-81, 82-110, 111-139. Santiago's prior convictions included assault and battery on a police officer, assault and battery with a dangerous weapon, and three instances involving distribution of heroin or other illegal drugs. Transcript of Sentencing Hearing ("Sentencing Tr.") (Docket No. 38) at 4-5, 8. Santiago also had a history of traffic offenses, including revocation of his license as a habitual offender. *Id*. at 9. When asked if he wished to speak in mitigation of punishment at his sentencing hearing, Santiago, through an interpreter, said:

> I would like you to tell Your Honor, that at no moment did I have contact with Wilfredo Figueroa, and that everything he said was a lie, and at no moment did I myself sell him drugs. Because of that, I really cannot accept this responsibility because I am innocent. Thank you, Your Honor.

Id. at 13. The sentencing range under the United States Sentencing Commission Guidelines was 262 to 327 months. *Id.* at 16.

Figueroa testified at Santiago's trial as a result of a plea agreement with the government

pursuant to which he was sentenced to 21 months. Trial Tr. at 26-27. By affidavit attached to his current motion, Santiago states that the government offered him a plea bargain before trial involving a 15 year (180 month) sentence, which he rejected. Petitioner's Affidavit ("Petitioner's Aff.") (Docket No. 42) ¶¶ (1) - (2). He states that the government then proposed a sentence of 8 1/2 years (102 months), which he accepted, based on his counsel's advice that Figueroa had received a sentence of 21 months, Figueroa's other supplier of heroin had received a sentence of 15 months, and both would testify against him at trial. *Id.* ¶ 3. His trial counsel advised him to accept this offer. *Id.* Santiago states that he "unambiguously" informed his counsel that he accepted this offer. *Id*. ¶ 4. The case nevertheless proceeded to trial. According to Santiago, this was a unilateral decision on the part of his trial counsel which was never discussed with him. *Id.* ¶ 5.

Santiago brings this action nine months after resolution of his direct appeal.

II. Analysis

Santiago bases his motion on his Sixth Amendment right to the effective assistance of counsel. He appropriately invokes the familiar standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. Under the circumstances of this case, however, it is unnecessary to address the *Strickland* factors in any great detail.

Santiago relies on *Turner v. State of Tennessee*, 858 F.2d 1201 (6th Cir. 1988), *vacated* 492 U.S. 902 (1989), *reinstated* 940 F.2d 1000 (6th Cir. 1991). Turner had followed his attorney's advice to reject a plea bargain with a two-year sentence. 858 F.2d at 1203. He was convicted after trial and sentenced to a life term plus forty years. *Id.* The Sixth Circuit affirmed the lower court's finding that Turner had received constitutionally deficient assistance of counsel. *Id.* at 1205. However, this is a case in which, by the terms of Santiago's own affidavit, his trial counsel advised him to accept the plea bargain. The ineffective assistance alleged is taking the matter to trial against the client's wishes.

A case closer on its facts and more instructive for purposes of the instant claim is *Diaz v. United States*, 930 F.2d 832 (11th Cir. 1991). Diaz alleged that his trial counsel rejected a plea bargain without consulting him, and also that his counsel advised him that the plea offer was "bullshit." *Id*. at 834. The record supported a conclusion that Diaz's counsel in fact discussed the merits of the offer with him before it was rejected. *Id.* at 835. The Eleventh Circuit rejected Diaz's Sixth Amendment claim.

> Given appellant's awareness of the plea offer, his after the fact testimony concerning his desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer. He has not established facts that, if proven, would entitle him to relief. The district court could have concluded from the record that appellant did not establish a reasonable probability that, absent counsel's alleged ineffective assistance, he would have accepted the plea agreement.

Id. (citation omitted). *See also Johnson v. Duckworth*, 793 F.2d 898, 902 & n.3 (7th Cir. 1986).

Here, in similar circumstances, Santiago offers nothing but after-the-fact testimony that an offer of a 102 month sentence was made and that he desired to accept the offer. In addition, this testimony directly conflicts with his statement at the sentencing hearing that he was innocent. Santiago argues that his statement at the hearing meant only that he was innocent of "the 'lies' Wilfredo Figueroa told the jury," but that this statement had no bearing on his guilt or innocence of the crime with which he was charged. Petitioner's Opposition and Memorandum of Law to Government Objection (Docket No. 45) at 3. However, a careful review of the trial transcript reveals that, without the testimony of Figueroa, there was no evidence of the crime with which Santiago was charged. Santiago's attempt to recast his statement at the hearing with the benefit of hindsight is unavailing. There is no reason why the presumption of truthfulness that attaches to a defendant's statements at a Rule 11 hearing on a guilty plea, *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984) (defendant must present at time of section 2255 motion credible, valid reasons why departure from his earlier contradictory statements is now justified), should not also attach to his statements at sentencing after trial. *See also United States v. Mateo*, 950 F.2d 44, 46-47 (1st Cir. 1991) (defendant's statement at sentencing hearing that he was in fact guilty could not leave doubt in reasonably competent counsel's mind that no plea challenge was desired).

Santiago's avowal of an intent to plead guilty in return for a sentence substantially shorter than that which he received after trial is also undermined by his extensive criminal history. Santiago spoke not a word concerning this intent during the trial, during the two months between the trial and his sentencing, or at the sentencing hearing. The affidavit submitted by Santiago with his motion does not suggest that he ever took any steps to communicate the fact of his acceptance to the government's attorney or to the court. It strains credulity too far to expect this court to accept that

a man who had been through the disposition of at least 14 criminal charges before this trial would remain silent during this trial concerning the plea bargain he claims to have accepted. Indeed, even when a sentence more than double that which he claims was offered and accepted was pronounced, he said nothing. *See Johnson*, 793 F.2d at 902. Santiago's silence through repeated opportunities to bring the alleged agreement to the attention of the court refutes his present allegations. *Watts v. United States*, 841 F.2d 275, 277-78 (9th Cir. 1988).

Because Santiago's basic factual assertion is contradicted by the record and inherently incredible, I conclude that his motion should be dismissed without an evidentiary hearing.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of May, 1997.

David M. Cohen
United States Magistrate Judge